Supreme Court, U.S.
FILED
SEP 28 1995
CLERK

(2)

No. 95-320

In The

Supreme Court of the United States

October Term, 1995

GRANT REYNOLDS AND THE ESTATE OF DALE C. ECKERT CORPORATION, IN BANKRUPTCY,

Petitioners,

vs.

PHILIP WAGNER AND WILLIAM SIMON,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION BRIEF OF RESPONDENT WILLIAM SIMON

CHARLES C. WEHNER*
STEPHEN T. HODGE

WEHNER AND PERLMAN
11100 Santa Monica Blvd.,
Suite 800
Los Angeles, CA 90025-3302
Tel: (310) 478-3131
Fax: (310) 312-0078

**Counsel of Record for Respondent William Simon*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

45 pp

QUESTIONS PRESENTED

1. Whether Petitioners have demonstrated any special and important reason for the granting of their Petition when the language of Federal Rule of Appellate Procedure 4(a)(5) and the accompanying Advisory Committee Notes make clear that a showing of excusable neglect must be made to grant a motion for extension of time to file a notice of appeal that is brought after the 30-day period prescribed in Federal Rule of Appellate Procedure 4(a)(1) has expired, when there is no conflict among the courts of appeals regarding the interpretation of Federal Rule of Appellate Procedure 4(a)(5), and when Petitioners' reason for not timely filing an appeal or a motion to extend the time to file a notice of appeal was that counsel for Petitioner Estate of Eckert and counsel for the trustee for the Estate of Eckert had been unable to schedule a meeting with the trustee to discuss the appeal, which rationale does not amount to either good cause or excusable neglect?

2. Whether Petitioners have demonstrated that this case is of such imperative public importance as to justify a deviation for normal appellate practice to grant their Petition when they have made no showing that their conduct in failing to timely file a notice of appeal of the district court's summary judgment decision against them, or to timely file a motion to extend time to file a notice of appeal, constituted either excusable neglect or good cause?

3. Whether this Court has jurisdiction to consider the instant Petition when the district court was without

QUESTIONS PRESENTED – Continued

authority to grant an extension of time to file a notice of appeal beyond November 12, 1993, but granted Petitioners an additional three days, until November 15, 1993, to file their appeal?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

JUDGMENT AND OPINIONS BELOW 1

JURISDICTION 3

STATEMENT OF THE CASE 4

SUMMARY OF THE ARGUMENT 4

REASONS FOR DENYING THE WRIT 7

I. PETITIONERS HAVE FAILED TO ESTABLISH ANY SPECIAL AND IMPORTANT REASON FOR THE GRANTING OF THEIR PETITION .. 7

II. PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THIS CASE IS OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO JUSTIFY THE GRANTING OF THEIR PETITION 12

III. THE DISTRICT COURT LACKED JURISDICTION TO EXTEND THE TIME FOR PETITIONERS TO FILE THEIR NOTICE OF APPEAL BEYOND NOVEMBER 12, 1993 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Alaska Limestone Corp. v. Hodel, 799 F.2d 1409 (9th Cir. 1986) 13

Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir. 1980) 16

Allah v. Superior Court, 871 F.2d 887 (9th Cir. 1989) 18

Allied Steel v. City of Abilene, 909 F.2d 139 (5th Cir. 1990) 8, 10, 15

Belcher v. United States, 94 Ct. Cl. 137 (1941) 9

Blum v. Stenson, 465 U.S. 886 (1984) 9

Borio v. Coastal Marine Constr. Co., 881 F.2d 1053 (11th Cir. 1989) 8, 12

Braxton v. United States, ___ U.S. ___, 111 S. Ct. 1854 (1991) 7

Buggs v. Elgin, Joliet & Eastem Ry., 852 F.2d 318 (7th Cir. 1988) 11

Certain Underwriters at Lloyds of London v. Evans, 896 F.2d 1255 (10th Cir. 1990) 17

Cleek Aviation v. United States, 22 Cl. Ct. 260 (1991) 15

Consolidated Freightways Corp. v. Larson, 827 F.2d 916 (3d Cir. 1987) 8

Cyrak v. Lemon, 919 F.2d 320 (5th Cir. 1990) 11

Gann v. Smith, 442 F.2d 352 (5th Cir. 1971) 15

In re Cosmopolitan Aviation Corp., 763 F.2d 507 (2d Cir. 1985) 8

Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991) 18

TABLE OF AUTHORITIES – Continued

Page

Lashley v. Ford Motor Co., 518 F.2d 749 (5th Cir. 1975) 17

McCalden v. California Library Ass'n, 919 F.2d 538 (9th Cir. 1990) 18

Meek v. Metropolitan Dade County, 908 F.2d 1540 (11th Cir. 1990) 16

Nichols-Morris Corp. v. Morris, 279 F.2d 81 (2d Cir. 1960) 15

Oregon v. Champion Int'l Corp., 680 F.2d 1300 (9th Cir. 1982) 8, 9, 10, 13

Pearson v. Gatto, 933 F.2d 521 (7th Cir. 1991) 8, 10

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., Partnership, ___ U.S. ___, 113 S. Ct. 1489 (1993) 3, 13, 14

Pontarelli v. Stone, 930 F.2d 104 (1st Cir. 1991)....11, 16

Pryor v. Marshall, 711 F.2d 63 (6th Cir. 1983) 10

Reynolds v. Wagner, No. 93-56629, slip op. 5773 (9th Cir. May 26, 1995) 13

Rodgers v. Watt, 722 F.2d 456 (9th Cir. 1983)..... 18

Rothman v. New York State Dep't of Transp., 474 U.S. 1032 (1985) 8

Scarpa v. Murphy, 782 F.2d 300 (1st Cir. 1986) 11

Spencer v. Brown, 17 F.3d 368 (Fed. Cir. 1994)..... 9

United States v. Virginia, 508 F. Supp. 187 (E.D. Va. 1981) 15

Vogelsang v. Patterson Dental Co., 904 F.2d 427 (8th Cir. 1990) 8

Weekly v. Jones, 927 F.2d 382 (8th Cir. 1991) 11

Wright v. Deyton, 757 F.2d 1253 (11th Cir. 1985) 12

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Federal Rule of Appellate Procedure 4(a)(1) 8, 10, 14, 15, 17

Federal Rule of Appellate Procedure 4(a)(5) ..... *passim*

Federal Rule of Appellate Procedure 26(b) 18

Federal Rule of Civil Procedure 6(a) 17

Federal Rule of Civil Procedure 6(e) 17

Federal Rule of Civil Procedure 56 1

Federal Rule of Civil Procedure 77(d) 17

Supreme Court Rule 10.1 7

Supreme Court Rule 11 12

Respondent William Simon respectfully submits this opposition to the petition for writ of certiorari:

JUDGMENT AND OPINIONS BELOW

On August 16, 1993, the United States District Court for the Central District of California entered an order granting summary judgment in favor of Respondents Philip Wagner and William Simon, and against Petitioners, on Petitioners' First Amended Complaint for alleged: (1) breach of a trustee's statutory duty; (2) attorney malpractice; (3) breach of contract; and (4) fraud.[1] A judgment pursuant to Federal Rule of Civil Procedure 56 was entered on September 1, 1993. (App. A.)

On the thirty-third day after entry of the judgment, Petitioner Estate of Dale C. Eckert Corporation (Estate of Eckert) filed a motion to extend the time within which to file its notice of appeal. (App. B.) The motion was based solely on purported good cause and stated that counsel for the Estate of Eckert had attempted to make contact with counsel for the trustee of the estate, and that they (counsel for the Estate of Eckert and counsel for the trustee) had been unable to schedule a meeting wherein they could meet and discuss the appeal with the trustee of the Estate of Eckert. (App. B, p. 3.) This motion was

[1] Petitioner Estate of Dale C. Eckert Corporation was a debtor in bankruptcy under Title 11 of the United States Code. The district court had jurisdiction of this matter pursuant to Title 28, Section 1409, of the United States Code. The jurisdiction of the court of appeals is disputed by Mr. Simon.

opposed by Respondent Simon on the grounds that Petitioner Estate of Eckert had failed to demonstrate either excusable neglect or good cause to support the extension. (App. C.) On October 28, 1993, the district court granted the Estate of Eckert's motion and extended the time to file an appeal until November 15, 1993. (Petitioners' App.) The motion was granted without a hearing, and the district court did not state the basis for its decision. On November 15, 1993, Petitioners filed their appeal. (App. D.)

On December 13, 1993, Mr. Simon filed a motion in the court of appeals to dismiss the appeal for lack of jurisdiction arguing that the district court had improperly granted the motion to extend time to file the appeal because no showing of excusable neglect was made, and that the district court was without authority to grant an extension of time to file the appeal past November 12, 1995. (App. E.) *See* Fed. R. App. P. 4(a)(5). A motions panel of the court of appeals denied the motion, citing Federal Rule of Civil Procedure 6(a) dealing with the computation of time for filings or acts performed in the district court. (App. F.) Thereafter, Mr. Simon timely filed a motion to reconsider and/or clarify the ruling on his motion to dismiss. (App. G.) On March 4, 1994, Mr. Simon's motion for clarification was granted, but the court of appeals reserved "for the panel considering [the] appeal on its merits" the question "of whether the district court abused its discretion in extending the time to file a notice of appeal based exclusively on 'good cause.' " (App. H.)

On May 26, 1995, after considering the appeal without oral argument, the court of appeals determined that

the threshold issue of jurisdiction must first be resolved and remanded this case "to the district court for a finding of whether [Petitioners'] explanation [for failing to timely file a notice of appeal or a timely motion for extension of time to file an appeal] meets the *Pioneer Investment Services*[2] standard" of excusable neglect. (Petitioners' App., p. 5783.) On August 23, 1995, Petitioners submitted their Petition for Writ of Certiorari, challenging the court of appeals' remand order.

JURISDICTION

It is respectfully submitted, as explained more fully below, that this Court does not have jurisdiction to review the order of the United States Court of Appeals for the Ninth Circuit by writ of certiorari because Petitioners have failed to demonstrate any special and important reason for the granting of their Petition and have also failed to demonstrate that this case is of such imperative public importance as to justify a deviation from normal appellate practice to grant their Petition. Additionally, the district court was without authority to grant Petitioners an extension of time to file their notice of appeal beyond November 12, 1993, and their appeal was therefore untimely and improper.

Furthermore, the decision of the United States Court of Appeals for the Ninth Circuit does not conflict with the decisions of other courts of appeals or state courts, nor

---

[2] *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., Partnership*, ___ U.S. ___, 113 S. Ct. 1489 (1993).

does it bring into question the validity of a treaty or statute of the United States or the validity of a statute of any state on the ground of its being repugnant to the Constitution, a treaty, or the laws of the United States, nor has Petitioner described any title, right, privilege, or immunity which would confer jurisdiction under the Constitution, a treaty, or the laws of the United States.

STATEMENT OF THE CASE

The factual statement of the case contained in the opinion below of the United States Court of Appeals for the Ninth Circuit, included in Petitioners' Appendix, is hereby incorporated by reference for purposes of this opposition only.

SUMMARY OF THE ARGUMENT

Petitioners have failed to demonstrate any special and important reason for the granting of their Petition. Specifically, the opinion of the United States Court of Appeals for the Ninth Circuit regarding the application and interpretation of Federal Rule of Appellate Procedure 4(a)(5)[3] is not in conflict with the decisions of other courts of appeals. Rule 4(a)(5) states that a "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time

[3] Unless specifically stated otherwise, all rules cited herein refer to the Federal Rules of Appellate Procedure.

prescribed by this Rule 4(a)." The Advisory Committee Notes following this Rule indicate that it was amended to add the "good cause" language because the excusable neglect standard "was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run . . . [but] it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time." Therefore, the good cause standard applies only to motions for extensions of time which are filed before the time to file a notice of appeal has expired.

Every court of appeals that has squarely addressed the issue has determined that a request for an extension of time to file a notice of appeal, filed before the notice of appeal is due, may be granted for good cause, but that a request for extension of time filed after the notice is due may only be granted under the excusable neglect standard. Though Petitioners cite several cases in an effort to rebut this position, a review of such cases readily demonstrates that they either have different factual circumstances than the case at hand and are thus distinguishable, or have been misconstrued by Petitioners.

Petitioners have also failed to demonstrate that this case is of such imperative public importance as to justify a deviation from normal appellate practice to grant their Petition. An analysis of the rationale for Petitioners' failure to timely file a notice of appeal (i.e., that Petitioners' counsel and counsel for the trustee of the Estate of Eckert had been unable to schedule a meeting wherein they could meet with "the trustee and obtain his instruction

regarding appeal") does not amount to excusable neglect or good cause.

It is well settled that indecision as to whether to appeal does not constitute excusable neglect for failure to timely file a notice of appeal. Nor does a request to extend the time to file a notice of appeal while a potential appellant ponders its options constitute either excusable neglect or good cause. Furthermore, good cause refers specifically to circumstances beyond a party's control, such as a mistake or a delay by court personnel. In this case, all the circumstances regarding Petitioners' appeal were in their control, or in the control of their counsel.

Finally, it is respectfully submitted that this Court does not have jurisdiction to review the order of the United States Court of Appeals for the Ninth Circuit by writ of certiorari because the district court lacked jurisdiction to extend the time for Petitioners to file a notice of appeal beyond November 12, 1993. Rule 4(a)(5) states that a district court may grant an extension of time to file a notice of appeal, upon motion filed within thirty days after the time to appeal has expired, but that such an extension shall not "exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later." In this case, despite the fact the time to appeal could not be extended beyond November 12, 1993, the district court granted Petitioners until November 15, 1993 to file their notice of appeal. The Federal Rules of Appellate Procedure are clear that the time for filing a notice of appeal may not be enlarged beyond what is specified in the Rules and, as a result, the district court was without authority to grant

this additional three days to Petitioners, and Petitioners' case is not properly before this Court.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE FAILED TO ESTABLISH ANY SPECIAL AND IMPORTANT REASON FOR THE GRANTING OF THEIR PETITION

Supreme Court Rule 10.1 states that review of a lower court's decision by writ of certiorari "is not a matter of right, *but of judicial discretion* . . . [and] will be granted *only when there are special and important reasons therefor.*" (Emphasis added.) Subpart (a) of Rule 10.1 states that one potential situation when review by writ of certiorari may be appropriate is when "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." *See generally Braxton v. United States*, ___ U.S. ___, 111 S. Ct. 1854 (1991).

Here, Petitioners have failed to demonstrate that any special and important reason exists for the granting of their Petition, specifically they have not demonstrated that there is a conflict among the courts of appeals regarding the interpretation and application of Rule 4(a)(5). As noted above, Petitioners failed to timely file a notice of appeal in this case. Instead, on October 4, 1993, three days after its time to appeal had expired, Petitioner Estate of Eckert filed a motion to extend the time within

which to file its notice of appeal.[4] This motion was based solely on the grounds that "good cause" supported an extension of time. However, the law is well settled that extension motions which are filed *after* the thirty-day period described in Rule 4(a)(1) has expired, must be supported by a showing of excusable neglect to be granted.

Rule 4(a)(5) states that "[t]he district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." The "good cause" language of Rule 4(a)(5) applies only to extension motions that are filed within the thirty-day period. If a party does not move for an extension of time within the thirty-day period set forth in Rule 4(a)(1), *the good cause standard is inapplicable and the party must meet the higher burden of excusable neglect. Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982); *see also Pearson v. Gatto*, 933 F.2d 521, 524 (7th Cir. 1991); *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427, 431 (8th Cir. 1990); *Allied Steel v. City of Abilene*, 909 F.2d 139, 143 n.3 (5th Cir. 1990); *Borio v. Coastal Marine Constr. Co.*, 881 F.2d 1053, 1055 (11th Cir. 1989); *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988); *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507 (2d Cir.), *cert. denied sub nom., Rothman v. New York State Dep't of Transp.*,

---

[4] Since only Petitioner Estate of Eckert was a movant, it is respectfully submitted that Petitioner Reynolds has not appealed the summary judgment order of the district court, and has no standing to challenge the court of appeals' ruling below.

474 U.S. 1032 (1985). As stated by this Court in *Champion Int'l Corp.*:

> "good cause" . . . is applicable only where a motion is filed before the [expiration] of the thirty-day period. The good cause language was added to the Rule [4(a)(5)] by a 1979 amendment because the excusable neglect standard "never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time." Advisory Committee Notes to 1979 amendment to Fed. R. App. P. 4(a)(5);[5] *see* 9

---

[5] The Advisory Committee Notes to Rule 4(a)(5) state, in relevant part, as follows:

> The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires [only] a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b) seems to be more appropriate.

Though Petitioners argue that the language of Rule 4(a)(5) should be interpreted "as it is written" without any consideration of the stated purpose for that rule or its amendment, such an approach is, in the words of the late Chief Judge Marvin Jones of the United States Court of Claims, "singularly free from any suspicion of logic." *Belcher v. United States*, 94 Ct. Cl. 137, 140 (1941). It is well established that the "ultimate objective" of interpreting any statute or rule is to give effect to the intent of the promulgators of that statute or rule. *See, e.g., Spencer v. Brown*, 17 F.3d 368, 372 (Fed. Cir. 1994). Even assuming *arguendo* that Rule 4(a)(5) was unclear, it would be a matter of course that the Advisory Committee Notes would be consulted and relied upon. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 896-97 (1984).

> *Moore's Federal Practice* ¶ 204.13[1.-1] (2d ed. 1980).

Champion Int'l Corp., 680 F.2d at 1301. This interpretation is consistent with that made by the *Pearson* court:

> The advisory notes to Rule 4(a)(5) make clear that a request for an extension of time filed *before* the notice of appeal is due may be granted for good cause, but a request for extension filed *after* the notice is due may only be granted under the higher excusable neglect standard.

Pearson, 933 F.2d at 524; *see also Allied Steel*, 909 F.2d at 143 n.3 (good cause standard not considered because appellant did not request an extension before expiration of the thirty-day appeal time set by Rule 4(a)(1)). It is respectfully submitted that in light of the Advisory Committee Notes to Rule 4(a)(5), and the overwhelming authority following that interpretation, there is no conflict which would require a ruling from this Court to resolve.

Though Petitioners argue that there are numerous courts of appeals which disagree with the Ninth Circuit's interpretation and application of Rule 4(a)(5) (i.e., that "excusable neglect" must be demonstrated when a motion to extend time to file a notice of appeal is filed after the initial thirty-day period has expired), their position is belied by a review of the cases cited in their Petition. Such a review readily demonstrates that the cases cited either have different factual circumstances than the case at hand and are thus distinguishable, or have been misconstrued by Petitioners.

For example, the court in *Pryor v. Marshall*, 711 F.2d 63, 65 (6th Cir. 1983) dealt with whether a late notice of

appeal could serve as a substitute for a motion for extension of time under Rule 4(a)(5), not whether an untimely extension motion could be granted on a showing of only good cause. Similarly, in *Weekly v. Jones*, 927 F.2d 382 (8th Cir. 1991), a motion for extension of time to file an appeal was filed on the 30th day after notice of entry of judgment was given. The *Weekly* court found that the motion was *timely* and that either the good cause or excusable neglect standard was applicable. *Weekly*, 927 F.2d at 385-86. Moreover, the decision in *Cyrak v. Lemon*, 919 F.2d 320 (5th Cir. 1990) dealt with the issue of which appeal among multiple appeals started the time to run for filing a cross-appeal under Federal Rule of Appellate Procedure 4(a)(3) when the first appeal was later dismissed for want of prosecution. The court in *Buggs v. Elgin, Joliet & Eastern Ry.*, 852 F.2d 318 (7th Cir. 1988) cited Rule 4(a)(5), with emphasis on the thirty-day provision, to determine whether a party who appealed an amended judgment, entered over seven months after the original judgment had been filed, had timely filed an appeal. *Buggs*, 852 F.2d at 322-23.

Though the United States Court of Appeals for the First Circuit has made reference to the "appropriate" interpretation of Federal Rule of Appellate Procedure 4(a)(5) in dicta, it has not squarely addressed the issue. *See Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991) (holding that the failure to individually and separately identify all appellants in the notice of appeal constituted inexcusable neglect); *Scarpa v. Murphy*, 782 F.2d 300 (1st Cir. 1986) (motion to extend time to file a notice of appeal based on excusable neglect was granted when notice of appeal was timely mailed, but failed to include the street number on

address of courthouse, and post office failed to deliver until after time to file notice of appeal had expired). Further, the opinion of the United States Court of Appeals for the Eleventh Circuit in *Wright v. Deyton*, 757 F.2d 1253 (11th Cir. 1985), appears to have been overruled by its later decision in *Borio v. Coastal Marine Constr. Co.*, 881 F.2d 1053, 1055 (11th Cir. 1989).[6] It is therefore respectfully submitted that no conflict exists which would warrant a writ of certiorari to review the underlying remand.

II.

PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THIS CASE IS OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO JUSTIFY THE GRANTING OF THEIR PETITION

Supreme Court Rule 11 states as follows:

> A petition for writ of certiorari to review a case pending in a United States court of appeals, before judgment is given in that court, will be granted *only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court.*

(Emphasis added.)

It is respectfully submitted that, in light of the reasons set forth in Section I, *supra*, Petitioners have failed to demonstrate that this case of such imperative public

---

[6] In addition to being substantively overruled, it appears that the *Wright v. Deyton* opinion has never been cited for the same proposition for which Petitioners have cited it.

importance as to justify a deviation from normal appellate practice and have this Court grant their Petition. As noted above, the decision of the United States Court of Appeals for the Ninth Circuit recognized that the threshold issue of jurisdiction must first be resolved before the substantive appeal can be adjudicated, and remanded this case to the district court for a finding of whether Petitioners' explanation for failing to timely file a notice of appeal, or a timely motion for extension of time to file an appeal, constitutes excusable neglect as defined by the Court's recent decision in *Pioneer Investment*. The court of appeals' ruling was in response to the arguments raised by Respondents that Petitioners had failed to demonstrate either good cause or excusable neglect to support an extension of time to file their appeal.

In making this determination, the court of appeals stated that it had traditionally "viewed excusable neglect through a narrow lens, finding the standard satisfied only in 'extraordinary cases where injustice would otherwise result'." *Reynolds v. Wagner*, No. 93-56629, slip op. at 5780 (9th Cir. May 26, 1995) (quoting *Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982)); *see also Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1411 (9th Cir. 1986) (inadvertence or mistake of counsel does not constitute excusable neglect). The court of appeals, recognizing that its traditional view of excusable neglect was at odds with the liberalized meaning of excusable neglect under *Pioneer Investment*, held that "attorney negligence may, in certain circumstances, constitute 'excusable neglect'." *Reynolds v. Wagner*, No. 93-56629, slip op. at 5781 (9th Cir. May 26, 1995) (construing *Pioneer Inv. Servs. Co.*, ___ U.S. at ___, 113 S. Ct. at 1494-99 (1993)). It is important to note,

though, that Petitioners have failed to demonstrate that the Estate of Eckert's motion for extension of time to file a notice of appeal was supported by either excusable neglect or good cause.

First, there has been no showing that Petitioners' conduct constitutes excusable neglect, even under the *Pioneer Investment* standard. Petitioners have not demonstrated that their failure to timely file a notice of appeal, or a timely motion to extend time to file a notice of appeal, was due to attorney negligence or other potential excusable neglect. Rather, Petitioner Estate of Eckert moved for an extension of time (after the thirty-day period prescribed in Rule 4(a)(1) had expired) based solely upon alleged good cause. The rationale provided by the Estate of Eckert was that counsel for Petitioners had not received "timely instruction from all parties from whom instruction must be received" in order to have authorization to file the appeal.

Further, the declaration in support of the untimely motion states that counsel for the Estate of Eckert transmitted a copy of the summary judgment minute order to counsel for the Estate of Eckert on August 26, 1993 (thirty-five days before the initial thirty-day period expired), and requested instructions regarding appeal. The declaration also states that Petitioners' counsel and counsel for the trustee of the Estate of Eckert had "tried to make contact on several occasions," but had "been unable to schedule a meeting wherein [they] could meet with the trustee and obtain his instruction regarding appeal." Such facts do not constitute excusable neglect. *See Pioneer Inv. Servs. Co.*, ___ U.S. at ___, 113 S. Ct. at 1494-99 (1993).

It is well settled that indecision regarding whether to appeal a judgment does not constitute excusable neglect for failure to timely file a notice of appeal. *Cleek Aviation v. United States*, 22 Cl. Ct. 260, 261 (1991). In *Cleek*, the potential appellant had filed its notice of appeal the day after the deadline expired, in violation of Rule 4(a)(1). *Id.* at 261. Although the potential appellant's counsel argued that he was delayed in filing a notice of appeal because he was awaiting additional instruction from his client regarding whether to appeal, and that he should therefore have been allowed an extension of time, the court held that indecision as to whether to appeal did not constitute a basis for failure to timely file a notice of appeal. *Id.* at 262. *See also Gann v. Smith*, 442 F.2d 352, 353 (5th Cir. 1971) (the fact that State Attorney General changed his mind about appealing decision was not excusable neglect); *Nichols-Morris Corp. v. Morris*, 279 F.2d 81, 83 (2d Cir. 1960) (client's inability to make a decision on appeal was not excusable neglect); *United States v. Virginia*, 508 F. Supp. 187, 189-90 (E.D. Va. 1981) (indecisiveness of Solicitor General of United States did not constitute excusable neglect).

Moreover, the court in *Allied Steel*, in interpreting the scope of Rule 4(a)(5), stated that the Rule "clearly indicates that potential appellants *may not regard the period during which a district court may extend the time for filing a notice of appeal as a further period in which to ponder their options.*" *Allied Steel*, 909 F.2d at 143 (emphasis added). Accordingly, Petitioners have failed to demonstrate that their conduct in failing to timely appeal, or to timely request additional time to appeal, constituted excusable neglect.

Nor have Petitioners been able to make a showing of good cause, the very argument upon which their motion to extend was predicated. Good cause refers to circumstances beyond a party's control, such as a mistake or delay by court personnel. *See Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir. 1980) (court's delay in filing a notice after timely receiving it constituted good cause); *Meek v. Metropolitan Dade County*, 908 F.2d 1540 (11th Cir. 1990) (justifiable reliance on clerk's erroneous information regarding time to appeal constituted good cause). Conversely, *circumstances within a party's control do not constitute good cause. See Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991) (counsel's mistake in referring to parties with the term *"et al."* did not constitute good cause). Here, all the circumstances described regarding Petitioners' inability to timely file a notice of appeal, or to timely file a motion to extend time to file a notice of appeal, were within the control of Petitioners and their counsel, and no showing of good cause has been made.

It is respectfully submitted that Petitioners have not demonstrated that this case is of such imperative public importance as to justify this Court's deviating from normal appellate practice and granting the instant Petition, and that the Petition should be denied.

III.

THE DISTRICT COURT LACKED JURISDICTION TO EXTEND THE TIME FOR PETITIONERS TO FILE THEIR NOTICE OF APPEAL BEYOND NOVEMBER 12, 1993

A further reason to deny the Petition *sub judice* exists in the fact that the extension of time granted by the

district court exceeded the time allowed by the Federal Rules of Appellate Procedure. Rule 4(a)(5) allows an extension of time, after the proper showing (which has not been made in this case), "not later than 30 days after the expiration of the time prescribed by . . . Rule 4(a)[(1)] . . . or 10 days from the date of entry of the order granting the motion, *whichever occurs later*." (Emphasis added.) Accordingly, because the order granting the motion to extend the time for Petitioners to appeal was entered on October 28, 1993, *the latest that such time could possibly be extended under the Rules was November 12, 1993.*[7]

Despite this fact, Petitioners were granted an extension of time until November 15, 1993. (*See* Petitioners' App.) The law is well settled that a district court lacks authority to extend the time to appeal beyond that allowed by Rule 4(a)(5). *Certain Underwriters at Lloyds of London v. Evans*, 896 F.2d 1255, 1256 (10th Cir. 1990). The law is equally well settled that if the district court abused

---

[7] The original appeal time expired on October 1, 1993, and the thirtieth day thereafter was October 31, 1993. (Since October 31, 1993 was a Sunday, it is assumed that the time would have extended to November 1, 1993.) However, the district court's order granting Petitioners an extension of time was entered on October 28, 1993; and Petitioners therefore would have been entitled to ten days from that date to file their notice of appeal. Taking into account Federal Rule of Civil Procedure 6(a), which excludes from any computation of time all intermediate Saturdays, Sundays, and legal holidays when the "time prescribed or allowed is less than 11 days," the latest possible date to extend the time for Petitioners to appeal in this case was November 12, 1993. (November 11, 1993 was Veteran's Day, a legal holiday, and Federal Rule of Civil Procedure 6(e) would not add any additional time for mailing. *See* Fed. R. Civ. P. 77(d); *Lashley v. Ford Motor Co.*, 518 F.2d 749, 750 (5th Cir. 1975).)

its discretion by extending the time for Petitioners to appeal beyond that contemplated by the Federal Rules of Appellate Procedure, subsequent courts of review are also without jurisdiction. *See Rodgers v. Watt*, 722 F.2d 456, 458 (9th Cir. 1983); *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991); *McCalden v. California Library Ass'n*, 919 F.2d 538 (9th Cir. 1990); *Allah v. Superior Court*, 871 F.2d 887, 890 n.1 (9th Cir. 1989).

Additionally, it is respectfully asserted that the rules regarding the time provisions for filing of a notice of appeal cannot be suspended by a subsequent reviewing court. Suspension of the rules is governed by Rule 2, which states that the Rules may be suspended "[i]n the interest of expediting decision, or for other good cause shown . . . *except as otherwise provided in Rule 26(b).*" (Emphasis added.) Rule 26(b) states that a court of appeals may enlarge time under the rules, but that it "*may not enlarge the time for filing a notice of appeal.*" (Emphasis added.) Thus, Petitioners' appeal was untimely and their current Petition should be dismissed for lack of jurisdiction.

CONCLUSION

For all the reasons set forth herein, Respondent William Simon respectfully requests that the Petition for Writ of Certiorari in this matter be denied.

Respectfully submitted,

CHARLES C. WEHNER*
STEPHEN T. HODGE

WEHNER AND PERLMAN
11100 Santa Monica Blvd.,
Suite 800
Los Angeles, CA 90025-3302
Tel: (310) 478-3131
Fax: (310) 312-0078

**Counsel of Record for Respondent William Simon*

TABLE OF CONTENTS

APPENDIX

Appendix A – Judgment Pursuant to Federal Rule of Civil Procedure 56 of the United States District Court for the Central District of California, entered on September 1, 1993 ..... 1a

Appendix B – Notice of Motion and Motion for Extension of Time for Filing Notice of Appeal, filed in the United States District Court for the Central District of California by Petitioner/Plaintiff Estate of Eckert on October 4, 1993 ..... 1b

Appendix C – Memorandum of Points and Authorities of William Simon in Opposition to Motion of Plaintiff Estate of Eckert for Extension of Time to File Notice of Appeal, filed in the United States District Court for the Central District of California by Respondent/Defendant William Simon on October 14, 1993 ..... 1c

Appendix D – Notice of Appeal filed in United States District Court for the Central District of California by Petitioners/Appellants on November 15, 1993..... 1d

TABLE OF CONTENTS – Continued

Appendix E – Notice of Motion and Motion to Dismiss Appeal for Lack of Jurisdiction; Memorandum of Points and Authorities in Support; Declaration of Charles C. Wehner (without exhibits), filed in the United States Court of Appeals for the Ninth Circuit by Respondent/Appellee William Simon on December 13, 1993 ..... 1e

Appendix F – Order of the United States Court of Appeals for the Ninth Circuit denying Appellees' motions to dismiss, filed December 22, 1993 ..... 1f

Appendix G – Motion for Reconsideration of Appellee Simon's Motion to Dismiss for Lack of Jurisdiction; Memorandum of Points and Authorities in Support (without exhibits) filed in the United States Court of Appeals for the Ninth Circuit by Respondent/Appellee William Simon on January 9, 1994..... 1g

Appendix H – Order of the United States Court of Appeals for the Ninth Circuit granting Appellees' motion for reconsideration, filed March 4, 1994..... 1h